

ARIZONA CAPITAL REPRESENTATION PROJECT

131 E. Broadway Blvd.

Tucson, AZ 85701

(520) 229-8550

Amy Armstrong, Bar No. 022795

amy@azcapitalproject.org

Natman Schaye, Bar No. 007095

natman@azcapitalproject.org

Emily Skinner, Bar No. 025761

emily@azcapitalproject.org

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

2340 W. Ray Road, Suite 1

Chandler, Ariz. 85224

(480) 812-1700

Charles J. Babbitt, III, State Bar #023079

cbabbitt@mail.maricopa.gov

**IN THE SUPREME COURT OF ARIZONA**

|                                |   |                                 |
|--------------------------------|---|---------------------------------|
| In the Matter of: Petition to  | ) | Supreme Court No. R-13-0010     |
| Amend Rule 32.4, Arizona Rules | ) |                                 |
| Of Criminal Procedure.         | ) | Comment to Proposed Amended     |
|                                | ) | Rule of Criminal Procedure 32.4 |
| _____                          | ) |                                 |

The Arizona Capital Representation Project (“Project”) is a nonprofit death penalty resource center committed to ensuring fairness in the Courts and effective representation for all defendants and inmates facing execution in the State of Arizona. Since 1988, the Project has provided direct representation and *pro bono* consulting services to death row inmates and their lawyers, as well as offering training to capital

defense practitioners and tracking capital cases at all stages of proceedings. The Project is therefore thoroughly familiar with the standards for constitutional and fair proceedings in capital cases.

Arizona Attorneys for Criminal Justice (“AACJ”) is a not-for-profit membership organization representing approximately four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the Legislature. Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Project and AACJ hereby provide the following comment to Judge Welty’s Petition to Amend Rule 32.4 of the Arizona Rules of Criminal Procedure.

The Project and AACJ support the proposed rule change for the following reasons:

**1. Arizona Law and the Professional Standard of Care Require that Post-Conviction Counsel Conduct a Thorough, Independent Investigation of the Case**

The American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)<sup>1</sup> outline

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<sup>1</sup> All references are to the 2003 ABA Guidelines, which is the current version of the guidelines. However, capital counsel’s duty to conduct a thorough investigation has been extant for over 30 years. *Wiggins v. Smith*, 539 U.S. at 524 (1989 ABA Guidelines require counsel to conduct a thorough mitigation investigation); *Williams v. Taylor*, 529 U.S. 362, 396 (2000)(relying on 1980 ABA Standards for Criminal Justice for

the minimum duties and obligations of capital defense counsel in all stages of litigation, including post-conviction. These Guidelines have “long...[been] referred [to]” by the U.S. Supreme Court “as ‘guides to determining what is reasonable,’” *Wiggins v. Smith*, 539 U.S. 510, 522 (2003), *quoting Strickland v. Washington*, 466 U.S. 668, 688-89 (1984)(“Prevailing norms of practice as reflected in American Bar Association standards and the like...are guides to determining what is reasonable”); *see also, Hamblin v. Mitchell*, 354 F.3d 482, 486 (6<sup>th</sup> Cir.2003)(“(T)he *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the ‘prevailing professional norms’ in ineffective assistance cases.”); *United States v. Karake*, 370 F.Supp.2d 275 (D.D.C. 2005)(“...the Supreme Court has counseled that the ABA Guidelines for counsel in death penalty cases provide the governing norms.”). The ABA Guidelines “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” ABA Guidelines 1.1. The Commentary to Guideline 1.1 emphasizes that “these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.” ABA Guidelines at p. 2. These standards have been

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proposition that counsel have an “obligation to conduct a thorough investigation of the defendant’s background).

adopted by Arizona. Ariz.R.Crim.P. Rule 6.8 (requiring capital defense counsel to “be familiar with and guided by the performance standards in” the Guidelines).

Capital defense counsel “*at every stage* have an obligation to conduct a thorough and independent investigation relating to issues of both guilty and penalty.” Guideline 10.7 (emphasis supplied). Such investigation includes identifying and interviewing all “potential witnesses,” examining the state’s evidence and the crime scene, and conducting an “unparalleled investigation into [the client’s] personal and family history” including medical history, family and social history, educational history, military service, employment, and prior correctional experience. ABA Guidelines, Comment to Guideline 10.7. In addition to this independent investigation, the Guidelines acknowledge the additional hurdle capital post-conviction lawyers face in building trust with a client who has “put his life into the hands of at least one other lawyer and found himself on death row.” ABA Guidelines, Comment to Guideline 10.15.1. In short, the Guidelines recognize the “enormous amounts of time, energy, and knowledge” required to competently represent a capital post-conviction petitioner. *Id.* Indeed, the scope of post-conviction proceedings is even broader than at trial, because post-conviction counsel has the same investigative obligations as trial counsel and must also review the appellate record and examine and present entirely new issues such as “trial counsel’s performance, judicial bias or prosecutorial misconduct.” *Id.*

In Arizona, postconviction petitioners are required to “include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her.” Ariz.R.Crim.Pro. 32.5. Petitioners are required to provide “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition....” *Id.* These are not merely formal requirements. In order to obtain discovery in post-conviction proceedings, a petitioner is required first to file his or her petition and establish good cause therein. *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005). Further, in order to escape summary dismissal and obtain an evidentiary hearing on any ground for relief, the contents of the petition must establish “a material issue of fact or law which would entitle the defendant to relief,” i.e., a “colorable claim.” Ariz.R.Crim.Pro. 32.6(c).<sup>2</sup> Moreover, in post-conviction the defendant/petitioner carries ultimate the burden of proving the merits of the claim. Ariz.R.Crim.Pro. 32.8(c), Burden of Proof, (“The

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<sup>2</sup> A colorable claim is one that “if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993), *citing State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 805 (1990). Considerable factual development is required to establish a colorable claim. *State v. Torres*, 208 Ariz. 340, 343, ¶¶8-9, 93 P.3d 1056, 1059 (2004)(colorable claim established if the defendant makes sufficiently specific, factually based allegations); *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985)(unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App.2000)(in order to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements; a bare allegation of prejudice without supporting evidence is insufficient to create a colorable claim).

defendant shall have the burden of proving the allegations of fact by a preponderance of the evidence. If a constitutional defect is proven, the state shall have the burden of proving that the defect was harmless beyond a reasonable doubt.”). Thus, the time-consuming, pre-petition defense investigation is critical to ensuring fair and adequate capital post-conviction proceedings.<sup>3</sup>

The Supreme Court recently acknowledged the critical role of state post-conviction counsel, particularly in Arizona where post-conviction is the first opportunity for counsel to litigate trial, sentencing and appellate counsel’s effectiveness. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012)(holding post-conviction counsel’s ineffective assistance establishes cause to overcome the procedural default of a claim of ineffective assistance of trial counsel in federal habeas proceedings). The Court further recognized the dire consequences of unqualified post-conviction counsel, stating that “[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.” *Id.* at 1317; *see also Cullen v. Pinholster*, 131 S.Ct. 1388 (2011)(federal habeas review is limited to the

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<sup>3</sup> This is especially true in Arizona where Sixth Amendment ineffective assistance of counsel claims are deferred to post-conviction. *State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002); *see also, Martinez v. Ryan*, 132 S.Ct. 1309, 1318 (2012)(“Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim...there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage...”); *Strickland v. Washington*, 466 U.S. 668 (1984)(requiring a defendant prove that his counsel’s performance fell below the standard of care and that counsel’s deficient performance was prejudicial).

record developed in state court); *Coleman v. Thompson*, 501 U.S. 722 (1991)(habeas petitioner must exhaust his claims in state court to avoid the procedural default of his claims in federal habeas proceedings).

## **2. Capital Post-Conviction Counsel Require At Least 18 Months to Conduct a Competent Investigation and Draft the Petition**

While Rule 32.4 currently requires the petition to be filed within 120 days from the notice of post-conviction relief,<sup>4</sup> superior courts have routinely granted numerous extensions to allow counsel to conduct the investigation necessary. The Arizona Capital Representation Project maintains a database of all capital post-conviction cases in Arizona. Dating back to 2003, the shortest time period in which a capital petitioner filed his petition was 162 days. In that case, the post-conviction court, relying on Rule 6.8, ABA Guideline 10.7, and *Martinez v. Ryan*, 132 S.Ct. 1309, struck the petition, removed counsel, and referred the matter to the State Bar of Arizona for counsel's failure to investigate. *State v. Hargrave*, CR2002-009759, Minute Entry (5/2/2012). Of the remaining post-conviction petitions filed in capital cases since 2003, more than 75% required *at least* 18 months to investigate and draft the petition. On average, capital defense teams have taken 26 months to file the petition. Other than *Hargrave*, no capital post-conviction petitions were filed in less than one year.

The last ten years of data are representative of the significant effort required to investigate and prepare a post-conviction petition. A 1998 survey of cases at Florida's

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<sup>4</sup> When issuing the mandate, as a matter of course the Arizona Supreme Court stays this time limit until counsel is appointed.

Office of Capital Collateral Representation found it took, on average, more than 3,300 attorney hours to conduct a post-conviction proceeding. ABA Guidelines, Comment to Guideline 6.1, *citing* The Spangenberg Group, Amended Time & Expense Analysis of Post-conviction Capital Cases in Florida 16 (1998). Further, Rule 8.2(a)(4) of the Arizona Rules of Criminal Procedure provides that a capital defendant has the right to be brought to trial within twenty-four months of the notice of intent to seek death. As explained in §1, *supra*, the ABA Guidelines impose the same investigative obligations on post-conviction counsel and trial counsel. But in addition to the requisite independent investigation, post-conviction counsel must also examine the work of predecessor counsel, including review of the file—which on average is approximately 50,000 pages.<sup>5</sup> Case-specific factors that require additional time to prepare may include investigation that must be conducted in a foreign country, a petitioner who becomes incompetent during post-conviction proceedings, or a procedurally complex case, such as cases where the death sentence was vacated on direct appeal, then again imposed at a resentencing proceeding. The current deadline of 120 days to file a post-conviction petition is unrealistic and results in an unnecessary waste of judicial resources to consider defense counsel’s numerous requests for additional time. In the

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<sup>5</sup> Pursuant to federal Criminal Justice Act benchmarks, file review is expected to proceed at a rate of 60 pages per hour. Thus, for example, the capital defense team can expect to devote 500 hours to a 30,000 page file, 833 hours to a 50,000 page file, and 1166 hours to a 70,000 page file.



experience of the Project and AACJ, such extensions are necessary and proper, and the data demonstrates that they are routinely granted.

### **3. Conclusion**

The preparation of a high-quality post-conviction petition, consistent with defense counsel's obligations under the prevailing standard of care, requires months, if not years, of work by a team of lawyers, investigators, mitigation specialists, and experts. While experience demonstrates that 18 months will be inadequate in most cases,<sup>6</sup> the proposed amendment is far more realistic than the existing rule. For the reasons explained above, AACJ and the Project request this Court adopt Judge Welty's proposed change to Rule 32.4 of the Arizona Rules of Criminal Procedure.

Respectfully submitted this 20<sup>th</sup> day of May, 2013

By s/ Amy Armstrong  
Amy Armstrong, Director  
Arizona Capital Representation Project

Natman Schaye, Senior Capital Trial Counsel  
Emily Skinner, Staff Counsel  
Arizona Capital Representation Project

Charles J. Babbitt, III  
Attorney for Arizona Attorneys for Criminal  
Justice

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<sup>6</sup> See p. 7, *supra*.